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ALEXANDER L. STEVAS,  
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NO. 82-1651

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1982

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CRISPUS NIX, WARDEN OF THE IOWA STATE  
PENITENTIARY,  
PETITIONER,  
vs.  
ROBERT ANTHONY WILLIAMS,  
RESPONDENT.

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APPENDIX TO REPLY BRIEF

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May 31, 1983

PROOF OF SERVICE

On the 31st day of May, 1983, I, the undersigned, did serve the within Appendix on all other parties to this appeal by mailing two copies thereof to the respective counsel for said parties:

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TABLE OF CONTENTS

	<u>PAGES</u>
Proof of Service . . . . .	i
Appendix A (Supplemental Petition for Writ of Habeas Corpus). . . . .	1
Appendix B (Petitioner's Post-Hearing Memorandum) . . . .	13
Cost Certificate . . . . .	45

APPENDIX A (NIX V. WILLIAMS)

NO. 82-1651

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

ROBERT ANTHONY WILLIAMS,	)	
	)	
Petitioner,	)	CIVIL NO. 80-450-D
	)	
vs.	)	SUPPLEMENTAL PETI-
	)	TION FOR WRIT OF
DAVID SCURR, Warden of the	)	HABEAS CORPUS
Iowa State Penitentiary at	)	
Fort Madison, Iowa,	)	
	)	
Respondent.	)	

I

1. This petition is filed as a supplement to the Questionnaire-Petition that Petitioner is filing contemporaneously herewith pursuant to Rule 26 of the Local Rules of this Court. The Questionnaire-Petition and this Supplemental Petition are filed pursuant to 28 U.S.C. §§ 2241(c) and 2254, in that Petitioner is in state custody in violation of the United States Constitution.
2. Petitioner is an inmate currently in the custody of the Respondent, who is Warden of the Iowa State Penitentiary.

3. On July 15, 1977, in the Iowa District Court in and for Linn County, Iowa, a jury convicted Petitioner of first-degree murder. On August 19, 1977, Petitioner was sentenced to life imprisonment.

4. Venue is proper in this Court under 28 U.S.C. § 2241(d), in that Petitioner is confined within this District.

5. Petitioner has exhausted his state remedies under 28 U.S.C. § 2254(b) with respect to the issues presented in this Petition through a direct appeal from his conviction to the Iowa Supreme Court. The Iowa Supreme Court denied relief on November 14, 1979. State v. Williams, 285 N.W.2d 248 (Iowa 1979). The same court denied rehearing on December 13, 1979.

## II

6. Prior to trial, Petitioner twice requested that Mr. Sheldon Otis, an attorney from San Francisco, California, be appointed to represent him.

7. Mr. Otis had tried numerous serious felony cases, and was willing and able to accept appointment at no special cost to the county.

8. Mr. Otis' competence and willingness to serve as Petitioner's counsel were undisputed. The trial court indicated that if Mr. Otis had been retained, he would have been allowed to appear.

9. Even though the facts in Paragraphs 6-8, supra, were true, the trial court denied Petitioner's application for Mr. Otis's appointment.

10. No countervailing state interests existed to justify denying Petitioner's choice of appointed counsel.

11. The Iowa trial court's failure to allow Petitioner to select the counsel to whom he wished to entrust his defense, when such counsel was available and no countervailing state interests were involved, deprived Petitioner of his qualified right to select the counsel of his choice under the Sixth and Fourteenth Amendments to the United States Constitution.

12. The Iowa trial court's denial to Petitioner, an indigent defendant, of the same right to choose counsel that is given to defendants of sufficient means, solely on the basis of wealth and without any

substantial reason, irrationally discriminated against Petitioner in violation of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that his conviction referred to in Paragraph 3 be reversed.

### III

13. In Brewer v. Williams, 430 U.S. 387 (1977), the United States Supreme Court held that statements concerning the location of the body of the victim in this case had been obtained by law enforcement officers from Petitioner in violation of his Sixth and Fourteenth Amendment right to counsel.

14. Petitioner's statements concerning the location of the victim's body were obtained in violation of Petitioner's Fifth and Fourteenth Amendment rights in that a police officer continued to interrogate Petitioner after Petitioner indicated his choice to remain silent, and in that the statements were not voluntary. Williams v. Brewer, 375 F.Supp. 170 (S.D. Ia. 1974), aff'd, 509 F.2d 227 (8th Cir. 1975), aff'd, 430 U.S. 387 (1977).

15. These illegally obtained statements in fact led police officers directly to the victim's body.

16. Prior to trial, Petitioner filed a Motion to Suppress evidence of the discovery of the body or evidence relating to the body.

17. The Iowa trial court overruled this motion to suppress and permitted the prosecution to introduce evidence recovered from the body -- including semen, hair samples, and evidence of the cause or death -- on the ground that the prosecution had shown, by a preponderance of the evidence, that the body would have been found "in any event". The Iowa Supreme Court affirmed this ruling on appeal.

18. The Iowa trial court's application of the "inevitable discovery" rule violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that:

a. The "inevitable discovery" rule applied by the Iowa courts is itself violative of the Fifth, Sixth, and Fourteenth Amendments;

b. In requiring the prosecution to show only by a preponderance of the evidence, that the body would have been discovered "in any event", the Iowa courts used an inadequate burden of proof;

c. The Iowa courts erred in finding that the prosecution had met even the preponderance-of-the evidence burden.

19. Petitioner did not have a fair opportunity to litigate the claim of "inevitable discovery" in state court.

WHEREFORE, Petitioner prays that the conviction referred to in Paragraph 3 be reversed.

#### IV

20. Prior to trial, on May 16, 1977, Petitioner petitioned the trial court for a change of venue, citing the existence of prejudice and prejudicial publicity in Polk County. Petitioner asked that the court authorize public opinion surveys of a small number of potential trial sites and requested that a new venue not be set pending the results of such surveys.

21. On May 27, 1977, the trial court granted a change of venue, to Linn County, but denied the motion for opinion polls of potential trial sites.

22. Petitioner's case had generated an extraordinary amount of statewide pretrial publicity, including print and broadcast media reporting on the

first trial, the United States Supreme Court's 1977 reversal of Petitioner's 1969 conviction and numerous "facts" about the case. Given this massive, unfavorable publicity, the choice of trial site was extremely important to Petitioner's defense and to a fair trial.

23. Without an opinion survey or some substitute, the selection of an appropriate venue could not be made on any rational basis. The trial court itself acknowledged that it did not have any basis for selecting an alternative trial site.

24. The Iowa trial court's denial of Petitioner's Motion for Authorization of Public Opinion Polls for Purposes of Venue Selection denied Petitioner the effective assistance of counsel, due process, and equal protection, as guaranteed to him by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner respectfully prays that the conviction referred to in Paragraph 3 be reversed.

V

25. During the voire dire examination of prospective juror Victoria Neuzil, it was established that Mrs. Neuzil had been exposed to information

that Petitioner had pointed out to the police the location of the body of the victim.

26. During voir dire, Mrs. Neuzil made several statements indicating that she was unable to presume Petitioner innocent; that she could not put out of her mind what she already knew; and that it would be difficult for her to be a fair and impartial juror. Despite numerous questions by the prosecution and the defense, Mrs. Neuzil never stated that she could be a fair and impartial juror.

27. The trial court denied Petitioner's challenge for cause of Mrs. Neuzil. This denial constituted a violation of Petitioner's Seventh and Fourteenth Amendment rights to a fair and impartial jury and to due process.

WHEREFORE, Petitioner prays that the conviction referred to in Paragraph 3 be reversed.

## VI

28. At the close of all the evidence, Petitioner moved for a directed verdict of acquittal of the charge that he had committed first-degree murder by killing the victim with malice aforethought, pre-

meditation, and deliberation. The trial court overruled this motion, and included in its instructions to the jury an instruction on premeditated and deliberated first-degree murder.

29. There was no direct evidence of the circumstances of the victim's death. All that was established in this regard was that the victim died of asphyxiation, probably as a result of smothering, and that she had been sexually molested, but not penetrated, at or after the time of death.

30. This evidence legitimately supported an inference that the victim was killed with malice. The fact of the killing, however, could not then properly be used to infer premeditation and deliberation.

31. To convict of first-degree murder, there must be proof that the accused actually premeditated and deliberated, for the following reasons:

a. The legislature purposely divided murder into two degrees with different punishments afforded each;

b. The accused has the Due Process right to be convicted of a crime only upon proof beyond a reasonable doubt of all the elements of that crime;

c. Permitting conviction for premeditated first-degree murder solely on a showing of opportunity to deliberate, rather than actual deliberation and premeditation, would fail to provide objective standards [sic] to the jury.

32. For the reasons stated above, the lower court's denial of Petitioner's motion for directed verdict on the charge of premeditated and deliberated first-degree murder denied Petitioner the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that the conviction referred to in Paragraph 3 be reversed.

## VII

33. The indictment charged that Petitioner violated sections 690.1 and 690.2, Code of Iowa (1966), in that he "did with malice aforethought premeditation, deliberation, and intent to kill, murder Pamela Powers...."

34. The trial court's Instruction No. 8 permitted the Petitioner to be found guilty of first-degree murder on two theories: (a) on the "premeditation" theory mentioned in the preceding Paragraph, and (b) on the theory that Petitioner murdered the victim in the perpetration of a felony, viz., attempted rape.

35. When an indictment cites to the code section violated and defines in specific, narrowing terms the manner in which the offense was committed, the instructions to the jury must be in conformity therewith.

36. The variance between the indictment and the instructions to the jury deprived Petitioner [sic] of his right to be tried solely on the charges contained in the indictment, as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that the conviction referred to in Paragraph 3 be reversed.

#### VIII

37. Instruction No. 8 informed the jury that they could convict Petitioner of first-degree murder if they found beyond a reasonable doubt that Peti-

tioner killed the victim (1) willfully and unlawfully, (2) with malice aforethought, and (3) with premeditation, deliberation and specific intent or in the perpetration of the crime of attempted rape.

38. The third element of the instruction described the two alternative factual means by which first-degree murder may be committed, but the instruction failed to require the jury to agree on which of these two alternatives was applicable to Petitioner's actions.

39. Consequently, the verdict could have been a non-unanimous one, for example, with six jurors believing that Petitioner was guilty of premeditated murder but not felony murder and six jurors believing Petitioner was guilty of felony murder but not premeditated murder.

40. Instrucion [sic] No. 8 therefore deprived Petitioner of his fundamental rights to trial by jury and to proof beyond a reasonable doubt before conviction, as guaranteed by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that the Court reverse the conviction referred to in Paragraph 3 above.

Respectfully submitted,

/s/  
Robert Anthony Williams

APPENDIX B (NIX V. WILLIAMS)

NO. 82-1651

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

ROBERT ANTHONY WILLIAMS,	)	
	)	
Petitioner,	)	
	)	CIVIL NO. 80-450-D
v.	)	
	)	
DAVID SCURR, Warden of	)	
the Iowa State Penitentiary,	)	
Fort Madison, Iowa,	)	
	)	
Defendant.	)	

PETITIONER'S POST-HEARING MEMORANDUM

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION . . . . .	1
II. THE HYPOTHETICAL "INEVITABLE DISCOVERY" TEST APPLIED BY THE IOWA SUPREME COURT WAS CONSTITUTIONALLY IMPROPER . . . . .	1
III. EVEN IF THE HYPOTHETICAL INEVITABLE DISCOVERY DOCTRINE WERE PROPER, THE BURDEN OF PROOF APPLIED BY THE IOWA SUPREME COURT WAS INSUFFICIENTLY STRINGENT . . . . .	4
IV. THE RECORD DOES NOT SHOW THAT THE VICTIM'S BODY WOULD HAVE BEEN FOUND IN THE ABSENCE OF THE ILLEGAL INTERROGATION OF PETITIONER . . . . .	4
V. <u>TOWNSEND V. SAIN AND 28 U.S.C. § 2254(d)</u> . . . . .	9
VI. <u>STONE V. POWELL DOES NOT PRECLUDE CONSIDERATION BY THIS COURT OF THE SUPPRESSION ISSUE</u> . . . . .	12

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

ROBERT ANTHONY WILLIAMS,	)	
	)	
Petitioner,	)	CIVIL NO. 80-450-D
	)	
v.	)	PETITIONER'S POST-HEARING
	)	
	)	MEMORANDUM
DAVID SCURR, Warden of	)	
the Iowa State Penitentiary,	)	
Fort Madison, Iowa,	)	
	)	
Defendant.	)	

## I. INTRODUCTION

Because Petitioner anticipated that he would present additional evidence relating to the motion-to-suppress ("inevitable discovery") issue in this case at the August 3 hearing, he did not address this issue in his Reply Memorandum (filed July 13, 1981). Consequently, this Memorandum will first respond to the legal arguments regarding "inevitable discovery" that were made in Respondent's Brief of April 1, 1981. The Memorandum will then discuss the impact of the evidence presented at the August 3 hearing on the issue of whether the victim's body would have been discovered in the absence of the Fifth and Sixth Amendment violations that led law enforcement officers to the victim's body on December 26, 1968. Finally, the Memorandum will address the Stone v. Powell issue raised by Respondent.

## II. THE HYPOTHETICAL "INEVITABLE DISCOVERY" TEST APPLIED BY THE IOWA SUPREME COURT WAS CONSTITUTIONALLY IMPROPER.

A. Respondent relies heavily on the Iowa Supreme Court's analysis of the split in the United States Court of Appeals regarding the "inevitable discovery"

doctrine, and updates that analysis with more recent circuit decisions. (Brief at 7-9). Given the split in the circuits, and the absence of any definitive inevitable discovery decision in the Eighth Circuit, this "counting of courts" is not terribly useful in the instant case. However, Petitioner would note that the Iowa Supreme Court's and Respondent's analysis of the circuit court precedents is quite misleading, for several reasons.

1. In at least four of the decisions counted by the Iowa Supreme Court -- United States v. Soehnlein, 423 F.2d 1051 (4th Cir.), cert. denied, 399 U.S. 913 (1970); United States ex rel. Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974); Wayne v. United States, 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963); and United States v. Schmidt, 573 F.2d 1057 (9th Cir.), cert. denied, 439 U.S. 881 (1978) -- the court's references to the inevitable discovery doctrine were pure dictum. See United States v. Alvarez-Porras, 643 F.2d 54, 64 (2d Cir. 1981); United States v. Hoffman, 607 F.2d 280 (9th Cir. 1979).

2. The Second Circuit decision counted on by the Iowa Supreme Court -- United States v. Ceccolini, 542 F.2d 136 (2d Cir. 1976), rev'd on other grounds, 435 U.S. 268 (1978) -- involved discovery of a live witness, rather than physical evidence. <sup>1/</sup> Moreover, it is not clear that the court of appeals in Ceccolini actually applied the inevitable discovery doctrine in reaching its result. Finally, other Second Circuit decisions have rejected the inevitable discovery doctrine. United States v. Paroutian, 249 F.2d 486, 489 (2d Cir. 1962); United States v. Alvarez-Porras, supra.

3. As Respondent concedes, the Ninth Circuit -- which the Iowa Supreme Court counted as supporting the inevitable discovery doctrine, 285 N.W.2d at 256 -- has indicated that it has not adopted that doctrine. United States v. Hoffman, 607 F.2d 280, 285 (9th Cir. 1979).

4. Thus, only one circuit -- the Third, see Virgin Islands v. Gereau, 502 F.2d 914, 927-28 (3d

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<sup>1/</sup> The Supreme Court emphasized this distinction in its opinion in Ceccolini. See 435 U.S. at 276-77.

Cir. 1974), cert. denied, 420 U.S. 909 (1975) -- has actually adopted the inevitable discovery doctrine. And in Gereau, the court required that inevitable discovery be demonstrated by clear and convincing evidence, a far more stringent test than the "preponderance" standard used by the Iowa Supreme Court.

5. Respondent attempts to add the Fifth Circuit to the inevitable discovery column by reference to United States v. Brookins, 614 F.2d 1037 (1980). But the Brookins decision is clearly distinguishable, and adopts -- in dictum -- only a very narrow version of the inevitable discovery doctrine that is inapplicable to the instant case. The defendant in Brookins sought to exclude the testimony of a witness because his identity had been obtained through an illegal interrogation. The court of appeals first held that the discovery of the witness was too attenuated from the interrogation to be tainted thereby, relying on Ceccolini v. United States, 435 U.S. 268 (1978). 614 F.2d at 1042-44. In the alternative, the court found that the witness would have been discovered even without the illegal interrogation.

In doing so, however, the court emphasized two factors that were critical to its use of what it characterized as a 'narrow' version of the "inevitable discovery exception": (a) that the prosecution demonstrated that the police possessed the leads that made discovery inevitable prior to the illegal interrogation; and (b) that "the evidence in question was the voluntary testimony of a witness." 614 F.2d at 1042, n.2. Of course, neither of these factors was present in the instant case.<sup>2/</sup>

6. In sum, only one Circuit -- the Third -- has actually adopted an inevitable discovery doctrine like that used by the Iowa Supreme Court in the instant case; and that Circuit has required the prosecution to meet a more stringent burden of proof than a mere "preponderance of the evidence." At the same time, at least one Circuit has clearly rejected the doctrine.

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<sup>2/</sup> The "prior leads" factor serves to mitigate the emasculating effect on constitutional protections of permitting the police an inevitable discovery loophole. And the distinction between live witnesses and other kinds of evidence has been recognized by the United States Supreme Court, see United States v. Ceccolini, 435 U.S. 268, 276-77 (1978), quoted at p. 10 of Respondent's Brief.

United States v. Griffin, 502 F.2d 959 (6th Cir., cert. denied), 419 U.S. 1050 (1974).<sup>3/</sup> This is hardly overwhelming precedential support.<sup>4/</sup>

B. Respondent simply ignores the Supreme Court precedents, including Wong Sun v. United States, 371 U.S. 471 (1964), Brown v. Illinois, 422 U.S. 590 (1975), and United States v. Wade, 388 U.S. 218 (1967), that demonstrate that the proper test for deciding the motion to suppress was whether the victim's body in fact was

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<sup>3/</sup> Both the Iowa Supreme Court and Respondent characterize Griffin as an opinion that could be read "either way." However, a reading of Griffin demonstrates that it rejects the inevitable discovery doctrine as emasculating the warrant requirement of the Fourth Amendment. 502 F.2d at 961. See United States v. Alvarez-Porras, supra, 643 F.2d at 64-65.

<sup>4/</sup> Respondent also relies on Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964). (Brief at 6-7). However, in Killough, the court emphasized that the discovery of the victim's body went solely to the fact that the victim was deceased, and did not serve to connect the defendant with the crime; in the instant case, on the other hand, the discovery of the body produced additional evidentiary items. Moreover, the status of Killough as precedent is placed in doubt by the decision in Crews v. United States, 389 A.2d 277 (D.C. 1978) (en banc), rev'd on other grounds, 100 S.Ct. 1244 (1980).

discovered by means "sufficiently distinguishable" from the unconstitutional interrogation of Petitioner -- not whether the body hypothetically would have been discovered even if that interrogation had not taken place. Under the former test, of course, there is no legitimate question about the result in this case, since the discovery of the body in fact was the direct and immediate result of Petitioner's statements to the police.

III. EVEN IF THE HYPOTHETICAL INEVITABLE DISCOVERY DOCTRINE WERE PROPER, THE BURDEN OF PROOF APPLIED BY THE IOWA SUPREME COURT WAS INSUFFICIENTLY STRINGENT.

Since Respondent does virtually nothing to address the argument that the preponderance-of-the-evidence burden of proof utilized by the Iowa Supreme Court was not sufficiently strict, Petitioner need add little to his Memorandum in Support of Petition on this question. Petitioner would only note that Respondent's attempt to equate the "preponderance" test with the "actualities, not possibilities" language he attributes to Hoffman, supra (Brief at 11) is fatally flawed, since that language actually comes from United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962) -- which rejected the inevitable

discovery doctrine. United States v. Hoffman, supra, 607 F.2d at 285, n.3.

IV. THE RECORD DOES NOT SHOW THAT THE VICTIM'S BODY WOULD HAVE BEEN FOUND IN THE ABSENCE OF THE ILLEGAL INTERROGATION OF PETITIONER.

The legal errors discussed in Division II and III, supra, by themselves require reversal of Petitioner's conviction. However, Respondent's defense of the hypothetical "inevitable discovery" doctrine necessitates an analysis in this Memorandum of the question of whether the victim's body would have been discovered "in any event" (i.e., even in the absence of the illegal interrogation of Petitioner).

The Iowa Supreme Court held that the victim's body would have been discovered even if Petitioner had not shown the police where the body was. In arriving at this conclusion, that court found (1) that the organized search for the victim would have extended into Polk County, to the area where the body was found, and (2) that the searchers would have seen the body because it was highly visible. State v. Williams, 285 N.W.2d 248, 262 (Iowa 1979).

The record in this case, and especially the additional evidence presented at the August 3, 1981, hearing, demonstrates that the Iowa Supreme Court's above-described findings were clearly erroneous, and that in fact it is highly unlikely that the search that was instituted on December 26, 1968, would have discovered the body. A fortiori, of course, the prosecution failed to meet its burden to show that the body would have been discovered "in any event," even under a preponderance-of-the-evidence standard.

Because of the nature of the additional evidence that was presented on August 3, it will be most convenient to address these matters in a more or less reverse chronological order, from the body backwards to the initiation of the search.

A. Even If The Search Had Extended Into Polk County To The Area Where The Body Was Located, Searchers Would Not Have Found The Body.

1. Visibility of the body

The Iowa Supreme Court relied on two photographs admitted into evidence at the 1977 motion to suppress hearing (Petitioner's Exhibits 3 and 5 in this pro-

ceeding) to find that the body would have been visible to searchers. It was critical to this finding that the Supreme Court believed that Exhibits 3 and 5 showed the body as it appeared when the police first found it:

The State also introduced photographs showing the body as it was actually found. These photographs show that Pamela Powers's body would not have been hidden by the inch of snow which accumulated in the area in the evening of December 26. . . . In addition, the left leg of the body was poised midair, where it would not have been readily covered by a subsequent snowfall.

State v. Williams, 285 N.W.2d 248, 262 (Iowa 1979).<sup>5/</sup>

(Emphasis added). The court apparently based this belief on testimony at the motion to suppress hearing by Mr. Thomas Ruxlow, an agent with the Bureau of Criminal Investigation (BCI), that Exhibit 5, showed

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<sup>5/</sup> Although the Iowa Supreme Court did not refer to the photographs by exhibit number, it is clear that the above-quoted language deals with Exhibits 3 and 5, since they were the only photographs of the body introduced at the suppression hearing.

the body exactly as it was found. 6/

The additional evidence presented on August 3 in the instant proceeding establishes beyond any question that the Iowa Supreme Court's belief that Exhibits 3 and 5 showed the body as it was found was incorrect (albeit through no fault of that court's). Thus, at his July 16, 1981, deposition, Mr. Ruxlow conceded that Exhibit 5 was taken after the scene had been altered and snow had been removed. (Ruxlow Dep. Tr. at 17). Even without Mr. Ruxlow's deposition testimony, Petitioner's Exhibit 1 demonstrates clearly

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6/  
Mr. Ruxlow's testimony with respect to Petitioner's Exhibit 5 (Exhibit D at the motion to suppress hearing) is at p. 42 of the transcript of the motion to suppress hearing:

Q. I hand you what has been marked State's Exhibit D and ask you if you can tell me what that depicts, if you know?

A. That's the same culvert as in State's Exhibit C. This is taken a little further away and it shows the, once again, the body of Pamela Powers on the west side of the culvert on the north side of the road.

Q. Has snow been removed or trampled down as indicated in State's Exhibit D?

A. No. That's exactly the way it was found.

that Exhibit 5 could not possibly show the body as it was found. While Exhibit 5 shows the body almost completely exposed to view, Exhibit 1 shows the body covered with a blanket of snow and obscured by brush.

The record also shows that Exhibit 3 (Exhibit C at the 1977 suppression hearing) was not of the body as it was found. Mr. Carroll Dawson, who was called to the scene with the Identification Section of the Des Moines Police Department, testified at the 1969 trial, and again at the 1977 motion to suppress hearing, that another officer took a single initial photograph of the body as it appeared when it was found. After this first photograph was taken, the body was moved, and the scene altered. <sup>7/</sup> Exhibit 1, in which

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<sup>7/</sup> Petitioner's Exhibit 13 is the portion of Mr. Dawson's testimony at the 1969 trial that pertains to the photographs taken at the scene. At p. 189, Mr. Dawson states: "(a)fter the first initial photograph was taken, showing the body partially covered with snow, we did brush the snow away and take additional photographs." (T. 189; emphasis added). At the motion to suppress hearing, Mr. Dawson testified that "after the initial photograph was taken, then we brush away -- I brushed part of the snow and found her to be frozen against the cement culvert. (Motion to Suppress Tr. at 22-23) (emphasis added).

the body is virtually indiscernable, must be the initial photograph to which Mr. Dawson referred. Thus, all the other photographs presented at the hearing on August 3 were taken after the scene had been disturbed. <sup>8/</sup>

In short, the only photograph that shows the body as it was found is Exhibit 1, which shows that the body was covered with snow and obscured by brush. <sup>9/</sup> Even though that photograph was taken at close range from above, the body is barely visible. Exhibit 1 is vivid proof that even if searchers had been walking along the road beside the culvert, they probably would not have seen the body.

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8/

Even Petitioner's Exhibit 2, in which the body is still snow-covered and barely discernible, was taken after the scene was disturbed. This can be seen by comparing Exhibit 1 and 2. In the latter, but not in the former, there is a line of no snow between the culvert and the body. Moreover, two sticks at the body's left hip are visible in Exhibit 2 but not in Exhibit 1.

9/

Although Exhibit 2 was taken after the scene was disturbed, it does show the brush that covered at least portions of the body.

2. Visibility of the culvert

The preceding paragraphs show that it is unlikely that the body would have been discovered even assuming that searchers would have gotten out of their vehicles in the area where the body was located. However, the record shows that even this assumption is not warranted. Mr. Ruxlow testified at the 1977 motion to suppress hearing the searchers generally looked for the body from their vehicles. (Motion to Suppress Tr. at 47-48). If they saw a "culvert or any out-building of an abandoned farm," they were supposed to get out of their cars to search the area thoroughly. (Motion to Suppress Tr. at 48). Obviously, if they could not see a culvert, they would not stop to search it.

Petitioner's Exhibits 7, 8 and 9 are photographs taken from the road approaching the culvert where the body was located. Although all of these photographs show the location of the culvert, it is not

visible in any of them. <sup>10/</sup> Even in Exhibit 7, which was taken within close proximity to the culvert, the culvert is indiscernible. The searchers, therefore, would not have gotten out of their cars to search the area thoroughly, and thus could not have found the body even if it had been more visible than Exhibit 1 shows it was.

B. The Search Would Not Have Continued Into Polk County, Where The Body Was Located.

The preceding paragraphs show that even if searchers had searched for the victim's body along the Polk County road beside which it was found, it is unlikely that they would have found it. The record also shows that the search would not have extended into Polk County in the first place.

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10/

At the July 16, 1981, deposition of Mr. Ruxlow, counsel for Respondent elicited testimony, through leading questions, that a tree line depicted in suppression Exhibits A and B would indicate to a "person who has grown up in Iowa that there's liable to be a culvert in that area." (Ruxlow Depo. Tr. at 39). However, this testimony is effectively contradicted by Petitioner's Exhibit 21 (Aff. of William Ponder).

At 8:00 a.m. on December 26, 1968, Mr. Ruxlow reported to his superior, BCI Agent Mayer, in Grinnell with the assignment of organizing a search for the victim. Mr. Ruxlow testified at the 1977 suppression hearing and at his 1981 deposition that even as of 8:00 a.m., the plan was to include Polk County in the search if necessary. (Motion to Suppress Tr. at 36; Depo. Tr. at 22). However, this testimony is belied by the other evidence in the record. Both Mr. Ruxlow's BCI Report (Exhibit 11) and Agent Mayer's BCI Report (Exhibit 12) specify that the search was to be conducted in Jasper and Poweshiek counties; neither report makes any mention of Polk County. Moreover, Mr. Ruxlow made preparations to search only in Jasper and Poweshiek counties. These preparations included obtaining maps of those counties; marking off the areas to be searched into grids; and assigning groups of volunteer searchers to specific grids (Motion to Suppress Tr. at 34). However, none of these steps was taken with regard to Polk County. (Motion to Suppress Tr. at 39).

Nor does the record support a conclusion that Mr. Ruxlow formed an intent to search in Polk County later in the day on December 26, 1968. At 3:00 o'clock that afternoon, the searchers were approaching the western boundary of Jasper County, having completed the planned search of Poweshiek County. (Motion to Suppress Tr. at 59). At that time, Agents Ruxlow and Mayer received a radio message to meet BCI Agent John Jutte at the Grinnell Interchange at Interstate 80. (Motion to Suppress Tra. at 51: Depo. Tr. at 20). They did so, leaving ~~no one~~ in charge of the search, and not knowing how long they would be gone. (Motion to Suppress Tra. at 51-52, 59).

At the Grinnell Interchange, Agents Mayer and Ruxlow talked with Agent Jutte and with Detective Leaming of the Des Moines Police Department. Detective Leaming requested that Agents Mayer and Ruxlow follow him as he proceeded west on I-80. (Ruxlow Depo. Tr. at 25-26). At this time, Agent Ruxlow had no information that Petitioner would lead the officers to the victim, and he did not know why he was following Detective Leaming or how long he

would be doing so. (Ruxlow Depo. Tr. at 25-28).

Agent Ruxlow also did not know whether the victim was dead or alive. (Ruxlow Depo. Tr. at 24).

Nevertheless, Mr. Ruxlow (and Mr. Mayer) did follow Detective Leaming.

Given these facts, Mr. Ruxlow's testimony that he intended to continue the search into Polk County defies belief. If Mr. Ruxlow had intended to continue the search into Polk County, it simply would not have made sense for him to abandon the search to follow Detective Leaming, for no known purpose and for an unknown length of time, when there were still two hours of daylight left, a group of searchers was already organized and available, and there still was a possibility that the victim was alive. Especially in light of all the other circumstances, the fact that Mr. Ruxlow and Mr. Mayer left Grinnell precisely at the time that the search of Jasper County was being concluded is too "neat" a coincidence to be credible. A far more logical explanation is that the intent was to search only Poweshiek and Jasper Counties, and that

Mr. Ruxlow and Mr. Mayer decided to leave Grinnell to follow Detective Leaming at 3:00 p.m. because they knew at that time that the searchers were about to complete the planned search of Powshiek [sic] and Jasper Counties. 11/

C. Conclusion.

Even under the Iowa Supreme Court's constitutionally improper "inevitable discovery" test, the prosecution in the instant case was required to demonstrate that it was more probable than not that Agent Ruxlow's searchers would have continued into Polk County and would have seen the culvert under which the body was hidden and would have seen the body despite the snow and brush that covered it. On the record in the instant case, however, it cannot reasonably be concluded that the State met even a "preponderance" burden with regard to any of these

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11/ In judging the credibility of Mr. Ruxlow's explanation, it should be kept in mind that he was informed prior to the 1977 suppression hearing that the issue at that hearing would be whether his search would have discovered the victim's body in Polk County (dep. Tr. at 30), and that he testified incorrectly at the suppression hearing about what Exhibit 5 depicted.

propositions, let alone all of them. <sup>12/</sup> To accept Respondent's "hypothetical probable inevitable discovery" argument on the facts of this case would be effectively to declare that virtually any showing would permit the State to escape the consequences of constitutional violations committed by its law enforcement agents.

V. TOWNSEND V. SAIN AND 28 U.S.C. § 2254(d)

At the hearing of August 3, 1981, this Court raised the question of whether it should consider the evidence introduced at that hearing that was not introduced in the state trial court in State v. Williams, rather than requiring Petitioner to first present that evidence to the state courts. As the succeeding paragraphs will show, the answer to that question is clearly "Yes."

12/

It should be noted that even if the prosecution had shown that each of the propositions, taken individually, was more likely than not, it would not follow that it was more likely than not that all three were true. (For example, if the probability of each proposition was as high as  $3/4$ , the probability that all three propositions were true would be  $3/4 \times 3/4 \times 3/4 = 27/64$ , or considerably less than  $1/2$ ).

At the August 3 hearing, the arguments of counsel on the question stated above centered on 28 U.S.C. § 2254(d). However, since § 2254(d) is essentially a codification of Townsend v. Sain, 372 U.S. 293 (1963), see Procunier v. Atchley, 400 U.S. 446, 451 n.6 (1971), Hawkins v. Bennett, 423 F.2d 948, 950 (8th Cir. 1970), it will be useful to begin with a discussion of that case. In Townsend, a federal habeas corpus petitioner claimed that a confession that had been introduced at his state-court murder trial was the product of coercion. The district court and court of appeals denied relief, holding that the state court's finding that the confession was voluntary was correct. Both courts specifically held that a federal habeas corpus court's inquiry was limited to the undisputed portions of the state-court record. The Supreme Court reversed, holding that the district court was required to hold a hearing to consider evidence which had not been presented to the state courts, but which bore on the constitutionality of the petitioner's detention. In Townsend,

the court referred specifically to evidence that a drug administered to the petitioner prior to his confession (hyoscine) was characterized as a "truth serum," and concluded that this was "crucially informative" evidence that "would have enabled the judge and jury . . . intelligently to grasp the nature of the substance under inquiry"--even though the petitioner had elicited testimony in the state trial court as to the nature and effects of hyoscine. 372 U.S. at 322.

In Townsend, the Supreme Court set out six circumstances in which a federal court must hear evidence on factual issues raised by state prisoners in habeas corpus proceedings. A federal court must hold an evidentiary hearing if:

- (1) the merits of the factual dispute were not resolved in the state hearing;
- (2) the state factual determination is not fully supported by the record as a whole;
- (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
- (4) there is a substantial allegation of newly discovered evidence;

- (5) the material facts were not adequately developed at the state-court hearing; or
- (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313.

The evidence Petitioner presented at the August 3 hearing falls within several of these categories, and within the Townsend holding. Petitioner's Exhibits 1 and 2, photographs that demonstrate that Pamela Powers' body was covered with snow and brush when the police found it, are "newly discovered" pieces of evidence that were not available at the time of the 1977 Motion to Suppress Hearing.

(Testimony of Gerald W. Crawford, Aug. 3, 1981;

Stipulation of Testimony of Roger Owens, Aug. 3, 1981)..

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13/ At the hearing of August 3, Mr. Crawford testified that although he had carefully reviewed the prosecution's file, including a number of photographs, prior to the suppression hearing (pursuant to an order of the trial court), he had not seen Exhibit 1 or Exhibit 2. Respondent stipulated that if he had been called to testify Mr. Owens would have testified to the same effect. As explained by Petitioner's counsel, these photographs were discovered by Legal Intern Christopher Jackson in a box containing a large  
(cont'd)

Moreover, the state courts were not presented with Exhibits 7-9 (photographs of the scene taken from the road); Exhibits 11 and 12 (reports by BCI Agents and Ruxlow); or Exhibit 16 (the 1981 deposition testimony of Mr. Ruxlow). Because these items of evidence were not presented, "the material facts were not developed at the state court hearing" and Petitioner was not afforded a "full and fair fact hearing." This is especially so in light of the fact that Exhibits 1 and 2 demonstrate that the Iowa Supreme Court relied on false evidence regarding the visibility of the body (see pp. 5-6, supra). Consequently, under parts (4) - (6) of the Townsend guidelines, this Court must consider the evidence presented at the August 3 hearing. Certainly the additional evidence presented in this case is entitled to no less consideration than the additional "truth  
13/ cont'd.

number of photographs in the Polk County Courthouse. Counsel have not been able to discover any explanation for the absence of the photographs from the prosecution's file in 1977.

serum" evidence in Townsend.

While Townsend itself requires consideration of the additional evidentiary materials presented at the hearing of August 3, it should be noted that § 2254(d) also requires the same. Section 2254(d) provides a presumption of correctness to state-court factual findings unless it appears:

- (3) that the material facts were not adequately developed at the State court hearing; (or)

\* \* \*

- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding . . . .

Given the additional evidence discussed in the preceding paragraph, it is plain that both of these above-quoted exceptions apply to the instant case.

Consequently, § 2254(d), like Townsend, required an evidentiary hearing in this Court. 14/

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14/

Although Townsend's "newly discovered evidence" category is not mentioned specifically in § 2254(3), it is subsumed under the "inadequate development of the facts" test of § 2254(3) (3).

This result is illustrated by Stumes v. Solem, 511 F.Supp. 1312 (D.S. Dak. 1981). In Stumes, the court held that police reports which had been in a federal habeas corpus petitioner's possession, but which had not been introduced at a state court evidentiary hearing, nonetheless should be considered at a federal evidentiary hearing to insure adequate development of the facts forming the basis of the petitioner's claims. See also Suggs v. LaVallee, 570 F.2d 1092 (2d Cir. 1978), cert. denied, 439 U.S. 915 (1978).

Since Townsend and § 2254(d) requires this Court to consider additional evidence, requiring Petitioner to "exhaust state remedies" by first attempting to present the additional evidence in state court would be improper. In Austin v. Swenson, 522 F.2d 168 (8th Cir. 1975), a federal habeas petitioner claimed that the State had withheld material evidence at his trial, and sought to have the evidence introduced at a federal hearing. The district court dismissed the petition without prejudice for failure to exhaust [sic] state remedies. On appeal, the Eighth Circuit vacated the dismissal and remanded the matter

to the district court with instructions to resolve the constitutional claims:

Absent a willful withholding of evidence by the defendant in the state proceeding, the requirement of exhaustion does not preclude the District Court from entertaining the issue previously raised in the state court and deciding the habeas claim upon the basis of new evidence.

522 F.2d at 170. The Court of Appeals explained that Townsend specifically contemplates a federal evidentiary hearing when significant new evidence is alleged. 522 F.2d at 170, n.6. Since Petitioner's claim that the body would have been found in the absence of his statements to law enforcement officers was considered by the Iowa Supreme Court, Petitioner need not seek further state post-conviction review of this issue simply because he has presented additional evidence in this Court.

VI. STONE V. POWELL DOES NOT PRECLUDE CONSIDERATION BY THIS COURT OF THE SUPPRESSION ISSUE.

A. While Respondent suggests that Stone v. Powell, 428 U.S. 465 (1976), should apply to the the instant case even though it does not involve a

Fourth Amendment violation, Respondent cites no authority in support of this suggestion. As Petitioner's Memorandum in Support of Petition (pp. 18-19) demonstrates, both Supreme Court decisions and lower federal court decisions have assiduously refused to expand Stone beyond its own Fourth Amendment confines. Given the fundamental differences between the Fourth Amendment, on the one hand, and the Fifth and Sixth Amendments, on the other, this is the only sensible result.

B. Even if Stone were applied to Fifth and Sixth Amendment violations, it would not preclude review by this Court in the instant case because Petitioner did not have a full and fair opportunity to litigate the suppression in the state courts. (See Memorandum in Support of Petition at 19-20). This is made especially clear by the additional evidence presented at the August 3 hearing. In reaching its decision on the suppression issue, the Iowa Supreme Court relied heavily on the two photographs of the body that were introduced at the state-court suppression hearing (Exhibits 3 and 5

in this proceeding), and on its belief (apparently based on the testimony of Agent Ruxlow) that they showed the body "as it was found." 285 N.W.2d at 262. Petitioner's Exhibits 1 and 2 -- and the deposition testimony of Agent Ruxlow -- make it clear that Exhibit 5 does not show the body as it was found. Similarly, Exhibit 1, taken together with the testimony of Officer Dawson at the state-court suppression hearing, makes it clear that Exhibit 3 also does not show the body as it was found. Consequently, the decisions of the state courts were based on a totally incorrect view of the evidence, albeit through no fault of theirs. Plainly, under these circumstances Petitioner did not have a fair and adequate opportunity to litigate the suppression issue in the state courts, and this Court therefore would not be precluded from considering the suppression issue on the merits

even if it involved the Fourth Amendment. Stone  
v. Powell, supra.

Respectfully submitted,

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COST CERTIFICATE

We hereby certify that the actual cost  
of printing the foregoing Appendix was the sum  
of \$48.00.

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